

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION II

CA08-585

October 29, 2008

B. C.

APPELLANT

APPEAL FROM THE SHARP
COUNTY CIRCUIT COURT
[CR-07-45]

V.

HONORABLE HAROLD S. ERWIN,
JUDGE

STATE OF ARKANSAS

APPELLEE

AFFIRMED

The sole issue in this case is whether the trial court erred in denying appellant's motion to transfer his case to juvenile court. We affirm the denial to transfer.

In *Williams v. State*, 96 Ark. App. 160, 162, 239 S.W.3d 44, 46 (2006) (citations omitted), this court set forth the standard of review in denial-of-transfer cases:

A defendant bears the burden of proving the necessity of a transfer from circuit court to juvenile court. Once the defendant meets this burden, the State must show countervailing evidence that warrants the circuit court retaining the case. A circuit court's decision to retain jurisdiction of criminal charges against a juvenile must be supported by clear and convincing evidence. Clear and convincing evidence is that degree of proof that will produce in the trier of fact a firm conviction as to the allegation sought to be established. When reviewing the denial of a motion to transfer a case to juvenile court, we view the evidence in the light most favorable to the State and do not reverse unless the circuit court's decision is clearly erroneous.

According to the second amended information, appellant was charged with the offense of rape, alleged to have occurred in the summer of 2002. The second amended information lists appellant's date of birth as April 29, 1987, making him fifteen years old at the time of the alleged offense. Pursuant to Arkansas Code Annotated section 9-27-318(c)(2)(E) (Repl. 2008), a prosecuting attorney may charge a juvenile in either the juvenile or criminal division of circuit court if the juvenile is fifteen years old when he engages in conduct that, if committed by an adult, would be rape. Then, upon motion, the circuit court judge shall conduct a transfer hearing to determine whether the case should be transferred to another division of circuit court. Ark. Code Ann. § 9-27-318(e). Subsection (g) of this statute requires that the trial court shall consider all of the following factors:

- (1) The seriousness of the alleged offense and whether the protection of society requires prosecution as an extended juvenile jurisdiction offender or in the criminal division of circuit court;
- (2) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner;
- (3) Whether the offense was against a person or property, with greater weight being given to offenses against persons, especially if personal injury resulted;
- (4) The culpability of the juvenile, including the level of planning and participation in the alleged offense;
- (5) The previous history of the juvenile, including whether the juvenile had been adjudicated a juvenile offender and, if so, whether the offenses were against person or property, and any other previous history of antisocial behavior or patterns of physical violence;
- (6) The sophistication or maturity of the juvenile as determined by consideration of the juvenile's home, environment, emotional attitude, pattern of living, or desire to be treated as an adult;
- (7) Whether there are facilities or programs available to the judge of the juvenile division of circuit court that are likely to rehabilitate the juvenile prior to the expiration of the juvenile division of circuit court's jurisdiction;
- (8) Whether the juvenile acted alone or was part of a group in the commission of the alleged offense;

- (9) Written reports and other materials relating to the juvenile's mental, physical, educational, and social history; and
- (10) Any other factors deemed relevant by the judge.

The court must consider each of these ten factors, but it is not required to give all ten factors equal weight. *Williams, supra*. Further, pursuant to subsection (h) of this statute, the trial court is now required to make written findings on each of the ten factors set forth above. See Ark. Code Ann. § 9-27-318(h); *Williams, supra*.¹

At the hearing on appellant's motion to transfer the case to juvenile court, appellant's grandmother testified that the appellant, her grandson, and the victim, who was approximately eight and also her grandson, were both at her house during the summer of 2002, and that nothing occurred that caused her to believe that there had been any inappropriate sexual contact between the boys. The State presented no testimony, but the prosecutor argued to the trial court that there was no punishment in the juvenile system for appellant, who was one month away from turning twenty-one at the time of the transfer hearing.

Appellant now argues, citing *Thompson v. State*, 330 Ark. 746, 958 S.W.2d 1 (1997), that the denial of his motion to transfer must be reversed because there was no evidence to substantiate the serious and violent nature of the charge of rape set forth in the second amended information. In *Thompson*, the juvenile was charged with aggravated assault,

¹In this case, the trial court did not make written findings on all of the factors set forth in Ark. Code Ann. § 9-27-318(g). The order denying appellant's motion to transfer merely states that the motion to transfer is denied. However, appellant never made this argument of noncompliance with the mandatory statutory provisions, either to the trial court or to this court. Therefore, this argument is deemed to have been waived. See *Williams, supra* (citing *Box v. State*, 71 Ark. App. 403, 30 S.W.3d 754 (2000)).

kidnapping, and theft of property. In that case, the State did not call any witnesses, and instead relied upon the allegations set forth in the information. In *Thompson*, our supreme court held, “If the State can merely rest upon the allegations in the information that the crime was violent and serious, there is no need to have such a hearing. . . . Hence, we hold that from the date of this opinion forward, there must be some evidence to substantiate the serious and violent nature of the charges contained in the information.” 330 Ark. at 751, 958 S.W.2d at 3.

In the present case, the State also called no witnesses; but, it is apparent from the dialogue between the trial court and the attorneys that the trial court placed great weight on the fact that appellant was less than one month away from his twenty-first birthday at the time of the transfer hearing, thereby leaving nothing in the way of juvenile sentencing available for appellant if the case were transferred to juvenile court. This case is substantially different from the facts in *Thompson*. Here the age factor, together with the fact that rape is a serious allegation and an offense against a person, is sufficient to support the trial court’s decision. We cannot say that denying appellant’s motion to transfer to juvenile court was clearly erroneous.

Affirmed.

BIRD and GRIFFEN, JJ., agree.